FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED STATES GYPSUM COMPANY, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 71,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and women throughout the United States. Over 67,000 corporations, partnerships, proprietorships and individuals engaged in professions are direct business members of the National Chamber; and, 83 per cent of the

* Pursuant to Rule 42, all parties have granted permission for the filing of this brief *amicus curiae*.

members are small businesses, each employing 100 or fewer employees.[1]

As a matter of long-standing policy, the National Chamber supports both the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.* (1973), and the meeting competition defense of section 2(b) of the Act, 15 U.S.C. § 13(b). In the instant case, by asserting that section 1 of the Sherman Act, 15 U.S.C. § 1 (1973), in effect bars Respondents from asserting the meeting competition defense, the Government and the district court below would nullify the vitality of this defense and eliminate price verification as a means of ensuring price flexibility in marketplace transactions.

In addition, the National Chamber is deeply concerned that the opinion of the Third Circuit Court of Appeals below permits price verification only in the most limited circumstances and thus unnecessarily restricts the availability of this tool in a seller's arsenal of permissible weapons to meet competition.

Moreover, because there are few *per se* rules of illegality under the Robinson-Patman Act, this Act creates more day-to-day compliance problems for business than any other federal, state or local antitrust law. The decisions of this Court in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), that price discrimination under the Robinson-Patman Act means

[1] This small business orientation of the Chamber of Commerce federation makes it especially appropriate for the Chamber to participate as an *amicus* in the instant case. The Robinson-Patman Act was enacted in response to the congressionally perceived need of small independent businesses to be shielded from discriminatory pricing practices. *Cf. FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963).

simply "price differences", and in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948), that the competitive injury requirements in secondary-line cases is satisfied by a simple showing that a seller has discriminated in price between competing customers in a not insignificant amount for a not insignificant time period, place every seller subject to the Act at the peril of treble damage suits from purchasers, and prosecution by the FTC, unless a defense to the price discrimination can be established.

The National Chamber respectfully suggests, then, that the decisions of the courts below, at the very least, stand for the proposition that, in the real-world marketplace, price verification and the ability to meet competitors' prices will no longer be available to sellers except in extremely limited circumstances. For these reasons, the decisions below affect not only the gypsum industry, but all interstate sales transactions in the normal manufacturer-distributor-retailer chain of distribution which are subject to the Act. Accordingly, the Chamber of Commerce is deeply concerned that this Court reaffirm the vitality of the meeting competition defense and permit the American business community to continue to compete effectively, forcefully, and legally in the open market.

ARGUMENT

Introduction

This case involves, *inter alia*, the propriety of certain jury instructions of the District Court concerning the relationship of the "meeting competition" defense of section 2(b) of the Robinson-Patman Act, 15 U.S.C.

§ 13(b),[2] and the prohibition against restraints of trade contained in section 1 of the Sherman Act, 15 U.S.C. § 1.[3]

Respondents, defendants below, were indicted for allegedly participating in a nationwide conspiracy to fix the prices, terms and conditions of sale, and methods of packaging and handling gypsum board, all in violation of section 1 of the Sherman Act. (Pet. App. A, p. 4a.) As explained by the Court of Appeals, "[t]he Government's case on price fixing centered on a practice . . . [of] . . . verification" (Pet. App. A, p. 12a), which involved the exchange of pricing information between and among the Respondents, who are competitors in a market which is highly competitive and in which "[p]rice discounts and changes in credit terms are the most important form of competition." (Pet. App. A, p. 4a.)

Respondents maintain that they did not violate section 1 of the Sherman Act because, *inter alia*, price verification was undertaken in order to ensure compliance with section 2(a) of the Robinson-Patman Act, which prohibits price discrimination. 15 U.S.C. § 13

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[2] Section 2(b) provides in relevant part:

> . . . nothing . . . shall prevent a seller [from] rebutting . . . [a] prima-facie case [of price discrimination] thus made by showing that his lower price . . . was made to meet an equally low price of a competitor . . .

[3] Section 1 reads in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

(a).[4] (Pet. App. A, p. 12a.) In certain limited instances, only by verifying the prices quoted by purchasers of gypsum products, Respondents have argued, could sales be made at lower prices in good faith to meet competition as permitted by section 2(b). (Pet. App. A, pp. 23a, 28a.)

At the conclusion of the trial, the judge instructed the jury that, regardless of defendants' purpose, any verification of prices was illegal, as long as the jury found that verification had the effect of stabilizing prices. (Pet. App. A, p. 13a.)[5]

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[4] Section 2(a) reads in pertinent part as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

[5] The actual jury charge was as follows:

> If you decide that, if you decide this [verification] was *merely done* in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, *standing alone*, as establishing an agreement to fix, raise, maintain, and stabilize prices, as charged.
>
> However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes [sic] as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices.
>
> . . . If the *effect* of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act *regardless of the specific purpose* that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense. (Emphasis supplied.)
>
> (App., vol. IV A. 1720-1722.)

The Court of Appeals rejected this instruction as erroneous, stating that compliance with the Robinson-Patman Act was a "controlling circumstance" which made the exchange of price information permissible. (Pet. App. A, p. 29a.) But, the Court of Appeals narrowly conditioned the availability of price verification upon specific circumstances which are far more limiting than any ever suggested by this Court or any inferior court. (Pet. App. A., pp. 28a, 29a.) [4]

1. The Jury Charge of the District Court and the Opinion of the Third Circuit Unduly Restrict the Availability of the Meeting Competition Defense.

A. The Instruction of the District Court That a Violation is Conditioned Upon the Effect and Not the Purpose of Price Verification is Clearly Erroneous.

This Court, in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951), definitively established that the section 2(b) defense, when proven, provides an absolute defense to price discrimination charges.[5] And, concomitant with this determination, this Court in its earlier decisions, *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), established with equal clarity that the Robinson-Patman Act and the section 2(b) defense were fashioned by Congress to promote competition.[6]

In the marketplace, however, effective price competition can be achieved only if sellers have the flexibility and discretion to respond to competitors' offers. *See* Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. Penn. L. Rev. 222 (1955). But, such responsiveness requires that the seller knows with some degree of precision his competitors' prices. In order to achieve this goal, the Robinson-Patman Act affirmatively requires the seller to seek out such information, if he desires to meet competition under section 2(b).[7]

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[4] The Court of Appeals concluded its discussion of the availability of price verification by stating:

> Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue.
>
> (Pet. App. A, pp. 28a, 29a.)

[5] Both this Court and the lower Federal courts have consistently applied this basic principle. *See, e.g.*, *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F. 2d 694 (9th Cir. 1964); *Jones* v. *Borden Co.*, 430 F. 2d 568 (5th Cir. 1970); *Hanson* v. *Pittsburgh Plate Glass Indus., Inc.*, 482 F. 2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Hampton* v. *Graf Vending Co.*, 478 F. 2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859, *reh. denied*, 414 U.S. 1087 (1973).

[6] *See also FTC* v. *National Lead Co.*, 352 U.S. 419 (1957); *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Surprise Brassiere Co.* v. *FTC*, 406 F. 2d 711 (5th Cir. 1969); *Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F. 2d 97 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F. 2d 694 (9th Cir. 1964); *Exquisite Form Brassiere, Inc.* v. *FTC*, 360 F. 2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966).

[7] The section 2(b) defense imposes upon the seller affirmative obligations to guard against price discrimination and to circumvent the potential duplicity of mendacious buyers. Specifically, in determining whether buyers are accurately communicating the prices charged by competitors, it is not sufficient to rely upon their representations. *See Forster Mfg. Co.* v. *FTC*, 335 F. 2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). In addition, the seller may not even rely upon the accumulated experience of its own sales

Price verification, then, is but another tool available to the conscientious seller who desires to comply with the Robinson-Patman Act. *Viviano Macaroni Co.* v. *FTC*, 411 F. 2d 255, 259 (3rd Cir. 1969). That price verification may permissibly take the form of an exchange of price information has long been recognized by this Court. *See Maple Floorings Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936); *Hartford Empire Co.* v. *United States*, 323 U.S. 386 (1945); *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966); *see also United States* v. *Citizens and Southern Nat'l Bank*, 422 U.S. 86 (1975).

The district court below and the Government here would nullify these precedents and prohibit verification if the effect of the price exchange were price stabilization. None of the rulings cited above support

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representatives to determine the veracity of the buyer's representations. *See Viviano Macaroni Co.* v. *FTC*, 411 F. 2d 255 (3rd Cir. 1969). It is no wonder that the Justice Department itself asserts that:

> . . . the seller may not safely rely upon oral representations by purchasers that a competing seller is offering a lower price. The Act requires that a seller be a judge of his customer's credibility, and that the seller "investigate or verify" the lower offer which it is seeking to meet. [Citing *Viviano Macaroni, supra.*]
>
> Department of Justice, *Report on the Robinson-Patman Act* 23 (1977).

Thus, the purpose of price verification is simply to enable the seller to "meet not beat" his competitor's prices by reducing prices in a lawful manner to the level of his competitors, as required by the Act.

this proposition, and adherence to the trial court's jury instructions would impose the additional obligation upon the seller of predicting the effect of verification upon market prices without any regard for the purpose of verification. Indeed, the decision of the trial court, taken to its logical conclusion in the marketplace, renders the section 2(b) defense and, *a fortiori*, this Court's *Standard Oil* decision, *supra*, a nullity.

B. The Decision of the Third Circuit Below Unduly Restricts the Availability of Price Verification to Sellers Who Desire to Meet Competition.

Although the Court of Appeals below would have permitted the jury to consider the purpose of verification,[10] the clear import of the court's language is that verification is to be used only as a last resort. The Chamber respectfully suggests that this is an unnecessary and ill-advised restriction upon a seller's ability to engage in lawful verification.

No decision of this Court has ever conditioned price verification upon a seller's first exhausting each and every alternative to contact with other sellers. Rather, the decisions of this Court and the lower courts contemplate that verification will be conducted as part and parcel of an on-going program of price competition. *See, e.g., Cement Mfrs. Protective Ass'n* v. *United States, supra; Sugar Institute, Inc.* v. *United States, supra; Gray* v. *Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175 (10th Cir.), *cert. denied*

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[10] Insofar as the decision of the Court of Appeals below reverses the trial court, the *amicus* respectfully suggests that, at a minimum, this Court must affirm the decision of the Court of Appeals below.

408 U.S. 928, *reh. denied*, 409 U.S. 1001 (1972); *Wall Products Co.* v. *Nat'l Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971).

Verification as part of an integrated marketing program is, in fact, required by the realities of the marketplace. In the final analysis, it is the determination of the individual seller, based upon his expertise in the marketplace, which will dictate whether he will "meet" the competition. The section 2(b) defense requires that he exercise his judgment in "good faith", not that he slavishly follow a judicially dictated checklist as suggested by the Court of Appeals below.

2. The Reliance of the Government Upon This Court's *Container* Decision is Wholly Misplaced.

The Court of Appeals below correctly concluded that price verification for the purpose of Robinson-Patman Act compliance is a "controlling circumstance" which insulates the seller from Sherman Act liability:

> Except for the court below, each court to consider the issue has agreed with [Respondents] that the attempt to establish a 2(b) defense amounts to a "controlling circumstance" that shields those exchanging information from Sherman Act liability. (Pet. App. A., p. 22a.)

The Government incorrectly argues, however, that *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969) stands for the proposition that the "controlling circumstance" doctrine is inapposite in the context of the Sherman Act. In so arguing, the Government ignores the clear import of the distinction between that case and *Cement Mfrs., supra:*

> . . . while there was present here [*in Container*] as in Cement Mfrs. . . . an exchange of prices to specific customers, there was absent the controlling circumstance, viz., that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job. 393 U.S. at 335.

Furthermore, in *Container*, this Court found no lawful purpose which motivated the exchange of price information; and, perhaps most significantly, the defendants did not assert the meeting competition defense of section 2(b).

Finally, cases decided by the lower courts subsequent to this Court's *Container* decision (and relied upon by the Third Circuit below) have consistently distinguished *Container* by looking to the purpose of the price information exchange in order to determine whether a lawful purpose existed as a controlling circumstance. Thus, in *Hanson* v. *Shell Oil Co.*, 541 F. 2d 1352, 1360 (9th Cir. 1976), the court found that, "Unlike [*Container*], this case does not involve companies exchanging secret price information *for the purpose of price stabilization.*" (Emphasis supplied.) *See also Gray* v. *Shell Oil Co., supra; Belliston* v. *Texaco, Inc., supra; Wall Products Co.* v. *Nat'l Gypsum Co., supra; Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S.D. Ala. 1971).

3. Marketplace Conditions Dictate Rejection of the Government's Alternatives to Price Verification as Unacceptable Impositions Upon Aggressive Price Competition.

Adoption of the Government's interpretation of *Container* would substantially hamstring the harmonization of the Sherman Act and Robinson-Patman Act mandated by this Court in *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 74 (1953) and, in a real sense, emasculate the "good faith" requirement of the section 2(b) defense.

Rather than advancing marketplace competition, the practical effect of the Government's restrictive view of the antitrust laws in this case would be to inhibit flexibility in pricing. As the Government has argued in another context, the fear of treble damage law suits and broad-sweeping injunctions act as a substantial deterrent to price reductions by sellers. Department of Justice, *Report on the Robinson-Patman Act* 33-36 (1977). The threat of the imposition of Sherman Act penalties for attempting to comply with the Robinson-Patman Act can only serve to exacerbate this already acute problem.

Furthermore, the alternatives to verification so sanguinely advanced by the Government—*viz.*, that the seller "gamble on the buyer's veracity", "decline to cut his price", or "make the sale at the price the buyer has requested and offer the same low price to other customers similarly situated" (Government Brief at 88-89)—are no more acceptable in the real business world than the decisions of the courts below.

In view of the potential civil liabilities already discussed, it is incredible that the Government would be so bold to suggest that businessmen "gamble" on Robinson-Patman Act compliance. In addition, reliance

upon the sanctions of section 2(f) which *might* be visited upon a lying buyer and thus *possibly* might deter buyer misrepresentations can scarcely be viewed as offering a "safe harbor" to the seller confronted with a competitive market. Quite to the contrary, the findings of the Third Circuit concerning purchasers of gypsum demonstrate the ineffectiveness of section 2(f) as a credible deterrent."

The second alternative, a decision not to cut prices, is by its very nature anti-competitive and, hence, inimical to the purposes of the antitrust laws. *See Standard Oil* v. *United States, supra,* at 311; *United States* v. *Socony-Vacuum Oil Co. Inc.,* 310 U.S. 150, 226 n. 59 (1940). More pragmatically, sellers in a highly competitive market would be hard-pressed to opt to lose sales, and perhaps customers, in order to satisfy the theoretical predelictions of the Government.

Finally, offering such a low price to "all others similarly situated" ignores the decisions that territorial, across-the-board price reductions are *prima-facie* violations of the Robinson-Patman Act in the primary-line of competition. *See FTC* v. *Anheuser-Busch, Inc., supra; Utah Pie Co.* v. *Continental Baking Co.,* 386 U.S. 685 (1967). The practical marketplace realities are simply that an individual seller contemplating an individual transaction will be loath to venture into

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[11] The Third Circuit found that the evidence supports Respondents' contentions that:

> . . . almost all discounting off list prices was not reflected in invoices, rendering that form of corroboration ineffective. In addition, . . . purchasers of the gypsum board was [sic] notoriously unreliable and often were discovered to have lied about a competitor's offer in order to "whipsaw" a price cut. (Pet. App. A, p. 15a.)

troubled waters in pursuit of judicial vindication of his right to offer reduced prices to selected purchasers.

The Chamber respectfully urges this Court to reject these theoretical conjectures advanced by the Government as nothing more than attempts to create a fantasy world in which sellers would be required to compete.

As this Court noted in *Sun Oil, supra,* the section 2(b) defense, properly limited to instances where the seller is meeting the competition of his own competitors, "comports . . . not only with the objectives of the Robinson-Patman Act but with the general antitrust policy of preserving the benefits of competition". 371 U.S. at 522.

CONCLUSION

For the reasons set forth above, the Chamber, as *amicus curiae,* respectfully urges that the decision of the Court of Appeals be modified; or, alternatively, that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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